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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 425

SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, et al.,
Appellants

v.

UNITED STATES OF AMERICA, FLORIDA EAST COAST RAILWAY COMPANY, et al.,
Appellees

On Appeal from the United States District Court for the Middle District of Florida

APPENDICES TO JURISDICTIONAL STATEMENT

VOLUME I

Of Counsel:
HAROLD J. GALLAGHER
WALTER H. BROWN, JR.
RICHARD A. HOLLANDER
EDWIN H. BURGESS
PRIME F. OSBORN
ALBERT B. RUSS, JR.
PHIL C. BEVERLY

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth St. N.W.
Washington, D. C. 20036
Attorneys for Appellants

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APPENDIX A

IN THE

United States District Court

FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Florida East Coast Building, St. Augustine, Florida,

Plaintiff,

versus

No. 64-64-Civ.J.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

Before RIVES, Circuit Judge, and SIMPSON and McRAE, District Judges.

OPINION

RIVES, Circuit Judge:

This is an action to enjoin, annul, and set aside orders of the Interstate Commerce Commission[1] which, subject to routing and gateway conditions and employee protective conditions, authorize the merger of the Atlantic Coast Line Railroad Company into Seaboard Air Line Railroad Company and the related acquisition of control by Seaboard of carriers subsidiary to or affiliated with Atlantic Coast Line, most prominently including Louisville and Nashville Railroad Company. Florida

[1] See 49 U.S.C § 17(9); 28 U.S.C. § 2321.

East Coast Railway Company brought the action against the United States and the Interstate Commerce Commission.[2]

[2]

Since the Attorney General, representing the United States,[3] opposes the merger, the United States has been realigned as a party plaintiff. Jurisdiction of this court is provided by 28 U.S.C. § 1336, and a district court of three judges has been convened as required by 28 U.S.C. § 2325.

Plaintiff Florida East Coast Railway Company, a Florida corporation, has its principal office at Saint Augustine, Saint Johns County, Florida, which is in the Middle District of Florida. Hence venue is properly laid in the Middle District. See 28 U.S.C. § 1398.

The Railway Labor Executives' Association, the Southern Railway Company, and its affiliated companies in the Southern Railway System intervened as parties plaintiff. The Mercantile-Safe Deposit and Trust Company, the Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company and The Atlantic Coast Line Company intervened as parties defendant in support of the challenged orders of the Commission.

Florida East Coast's motion for an order restraining temporarily the operation and effective date of the orders of the Interstate Commerce Commission, pending the final hearing and determination of the action, see 28 U.S.C. § 2324, was granted by the Honorable Bryan Simpson, Chief Judge, United States District Court for the Middle District of Florida, based on the specific finding that irreparable damage would

[3]

[2] See 28 U.S.C. §§ 2322, 2323; 49 U.S.C. § 17(9).
[3] See 28 U.S.C. § 2323.

result to the plaintiffs if the temporary restraining order was not granted. See 28 U.S.C. §§ 2284(3), 2324. Compare 28 U.S.C. § 2325.

The Commission stated that the merger it approves[4] would result in the elimination of present competition between Seaboard and Atlantic Coast Line in a six-state area.[5] In the six-state area and in an eight-state area,[6] the merged company would control more than 54 per cent of the total railroad mileage, while the Southern Railway Company, its nearest competitor, would have about 34 per cent. The merged company would have approximately 81 per cent of the railway mileage in Florida. See Seaboard Air Line R.R., 320 I.C.C. 122, 163 (1963). Approximately 4,257 jobs would be abolished and the location of employment would be changed for 4,439 other employees, 320 I.C.C. at 154. The Commission found that: the reduction of rail competition caused by the proposed merger will not be substantial; ample competitive rail service will remain after the merger throughout most of the affected area; and the reduction in competition that will result from the merger will have no appreciable injurious effect upon shippers and communities.

[4]

320 I.C.C. at 167. The Commission noted that the merger will have substantial adverse effects upon many railroad employees and their families, but, in the long run, the merger would provide greater job security and more stabilized conditions of employment for employees of the merged company. See 320 I.C.C. at 200. Both Seaboard Air Line and Atlantic Coast Line are currently in healthy financial condition.

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[4] Commissioner Webb, with whom Commissioner Tucker joined, dissented.

[5] The six states are Alabama, Florida, Georgia, North Carolina, South Carolina and Virginia.

[6] The additional states are Tennessee and Kentucky.

The questions raised in this three-judge district court action deal with the protective conditions for employees and with the relationship between section 5(2)[7] of the Interstate Commerce Act—which authorizes the Commission to approve proposed mergers that are found to be in the "public interest"[8] —and the antitrust laws, more specifically section 7 of the Clayton Act.[9]

Plaintiff Florida East Coast suggests that the ultimate importance of this case is that the Commission has written preservation of competition and prevention of monopoly out of the concept of "public interest."

[5]

Section 5(2)(c) of the Interstate Commerce Act, which sets forth certain factors which must be considered by the Commission in passing upon any proposed railroad merger or affiliation, does not expressly require that the Commission consider the antitrust laws as a factor in the public interest. The Commission is required by section 5(2)(c) to

> "give weight to the following considerations, *among others:* (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."[10]

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[7] 49 U.S.C. § 5(2).

[8] 49 U.S.C. § 5(2)(b); see *e.g.*, Phillips, Railroad Mergers: Competition, Monopoly, and Antitrust, 19 Wash. & Lee L. Rev. 1, 9 (1962).

[9] 15 U.S.C. § 18.

[10] 49 U.S.C. § 5(2)(c). (Emphasis added.) The Act of Sept. 18, 1940, ch. 722, tit. I § 1, 54 Stat. 899, which amended the Interstate Commerce Act, set forth the "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all

[6]

However, the Commission has long been required "to give weight to the antitrust policy of the nation before approving mergers and consolidations."[11] The antitrust laws are expressly considered in section 5(11) of the Act which exempts carriers and individuals participating in an approved merger

> "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved . . . and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."[12]

The Commission has been required to accommodate section 5(2) and the antitrust legislation due to the presence of the

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> modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with with a view to carrying out the above declaration of policy.*"

49 U.S.C.A. (Historical note following table of contents). (Emphasis supplied.)

11 Georgia v. Pennsylvania R.R., 1945, 324 U.S. 439,456.

12 McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 76-77; 49 U.S.C. § 5(11). In cases of affiliation of a motor carrier with a railroad, the Commission cannot approve the merger "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." 49 U.S.C. § 5(2)(b).

section 5(11) exemption[13] and the history of the development of

[7]

the national transportation policy.[14]

In giving weight to antitrust policy as a factor in the "public interest," plaintiff Florida East Coast contends that the Commission must define the "line of commerce" (relevant product, or services, market) and "section of the country" (relevant geographical market) in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly."[15]

[8]

On its face this contention may seem contrary to the Supreme Court's decision in *McLean Trucking Co. v. United*

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[13] Minneapolis & St. L. R.R. v. United States, 1959, 361 U.S. 173, 186.

[14] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 79.

[15] Section 7 of the Clayton Act provides in part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.
>
> . . . . . .
>
> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission. . . ."

15 U.S.C. § 18.

States.[16] *McLean* involved the Commission's approval of the consolidation of seven large motor carriers. The most important effect of the merger was to create an end-to-end consolidation from points in the far South to New England, with obviously large possibilities for through service.[17] The order approving the consolidation was attacked on the ground that the merger, notwithstanding Commission approval, violated the Sherman Act[18] and, hence, the Commission had no power to approve the merger. The Court decided that the Commission is not required to decide definitively whether the transaction violates the Sherman Act, but that the Commission's role is to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation

[9]

will assist in effectuating the over-all transportation policy."[19] However, *McLean* does not dispose of the plaintiff's contention. Basic to the Court's determination in that case was the holding that the Commission has no jurisdiction to enforce the proscriptions of the Sherman Act. The Court stated:

> "To secure the continuous, close and informed supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus here, *the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contem-*

[16] 321 U.S. 67 (1944).
[17] See *id.* at 71.
[18] See 15 U.S.C. §§ 1-3.
[19] *Id.* at 87.

> *plated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act.* The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action."

321 U.S. at 79-80 (Emphasis supplied.) In sharp contrast to the Commission's lack of jurisdiction to enforce the Sherman Act, Congress by section 11 of the Clayton Act has entrusted the Commission with authority to enforce compliance with section 7 and other Clayton Act provisions "where applicable to common carriers" under the Commission's jurisdiction.[20]

[10]

While "the Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems," the Clayton Act legislation constitutes an additional "frame of reference within which the Commission operates."[21]

We think *Minneapolis & St. L. Ry.* v. *United States*,[22] a decision more recent than *McLean*, recognizes that the Commission's estimate of the scope and appraisal of the effects of any curtailment of competition which might result from a merger is to be initially and properly approached in terms of whether the effect is "substantially to lessen competition, or to tend to create a monopoly." In *Minneapolis* the Commission found that a proposed railroad acquisition "would not result in any significant [much less substantial] lessening of com-

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[20] 15 U.S.C. § 21. See Georgia v. Pennsylvania R.R., 1945, 324 U.S. 439, 456 and n. 9.

[21] See McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 79-80.

[22] 361 U.S. 173 (1959).

petition.[23] Its determination was said to rest upon "adequate findings."[24]

[11]

There is an additional reason why the Commission is required to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger. It would seem that the Commission is required to "give weight" to antitrust policy in a section 5(2) proceeding only if the merger has the probable anticompetitive effect proscribed by section 7 of the Clayton Act. More specifically, when the effect of a proposed merger "may be substantially to lessen competition" or "to tend to create a monopoly," "in any line of commerce in any section of the country," the prohibition of the Clayton Act must be given weight. Conversely, when the proposed merger would not so result, the Commission is not required to give weight to antitrust policy. The Commission impliedly recognizes such a principle in its finding in the present case that the reduction of rail competition caused by the proposed merger will not be substantial. 320 I.C.C. 167.

Furthermore, it has long been settled that "immunity from the antitrust laws is not lightly implied."[25] When an agency, such as the Interstate Commerce Commission, is entrusted by Congress with authority to require compliance with section 7 of the Clayton Act,[26] and also to grant relief

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from the operation of the antitrust laws,[27] the logical corollary would be that the Commission will not grant immunity from the anti-

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[23] *Id.* at 188, 189.
[24] *Id.* at 189.
[25] See, *e.g.*, United States v. Philadelphia Nat'l Bank, 1963, 374 U.S. 321, 348.
[26] 15 U.S.C. § 21.
[27] 49 U.S.C. § 5(11).

trust laws unless clearly authorized by the law and required by the evidence.

For that policy to have any real substance the Commission is required to determine whether or not the effect of the proposed merger "may be substantially to lessen competition" or "to tend to create a monopoly," "in any line of commerce in any section of the country." That does not mean that the Commission may authorize only those acquisitions which would not offend section 7 of the Clayton Act.[28] The Commission with propriety may approve a rail consolidation, otherwise prohibited by the antitrust laws, in order to bring about needed or desirable improvement in service and economies in operation.[29] In other words, if the Commission finds that the policy of the Transportation Act would be thwarted unless a particular type of merger or consolidation were permitted, it would be authorized to approve the merger or consolidation,

[13]

although the transaction would otherwise violate section 7 of the Clayton Act.[30]

Concomitant to the Commission's determination of whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly," the Commission must define the area of effective competition by reference to a product, or service market (the "line of commerce") and a geographic market (the "section of the country").[31]

We note that in *Minneapolis & St. L. Ry., supra,* which considered both the Sherman Act and section 7 of the Clayton Act, the Supreme Court did not expressly direct the Commis-

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[28] See Minneapolis & St. L. Ry. v. United States, 1959, 361 U.S. 173, 187.

[29] See McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 78.

[30] See *id.* at 94 (dissenting opinion).

[31] See Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 324.

sion to define the relevant market by delineating a service market and a geographical market. However, that case was decided prior to *Brown Shoe Co.* v. *United States*, 1962, 370 U.S. 294. *Brown Shoe* was the first case to consider the background of the 1950 amendments to section 7 of the Clayton Act. In *Brown Shoe*, the Supreme Court set forth directions for measuring the relevant market within which the anticompetitive effects of a merger are to be judged.[32]

[14]

There is an additional reason for requiring the Commission to determine the product market and the geographic locus of competition. The Commission imposed routing and gateway conditions for the benefit of the intervening railroads to offset possible diversion of traffic by the merged company. It noted that "absent suitable protective conditions and consideration of these factors [the public advantage that will accrue from the merger], there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws."[33] We think it clear, as the Commission has recognized, that routing and gateway conditions bear a distinct relationship to the possible anticompetitive effects of the merger.

[32] Although Minneapolis & St. L. Ry. was decided in 1959, it is clear that only section 7 of the Clayton Act as enacted in 1914 was involved in that case and dealt with by the Court. See 361 U.S. at 185 & n. 11. The Court stated that "section 5(11) is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act. . . ." 361 U.S. at 186. However, the 1950 amendment to the section 7 of the Clayton Act is later in time than either section 5(11) or section 5(2) of the Interstate Commerce Act. Compare 15 U.S.C.A. § 18 (Historical note), with 49 U.S.C.A. § 5(2) (Historical note) and 49 U.S.C.A. § 5(11) (Historical note).

[33] 320 I.C.C. at 167. Compare 320 I.C.C. at 188. "We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation."